

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL E. RIGSBY and U.S. POSTAL SERVICE,  
POST OFFICE, Birmingham, AL

*Docket No. 98-298; Submitted on the Record;  
Issued August 6, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

In a decision dated October 2, 1995, the Office found that appellant had no greater than a 17 percent impairment of the right upper extremity as a result of his accepted employment injury.

On August 5, 1997 the Office received an undated letter from appellant inquiring about an appeal he sent to the district Office in September 1996 together with new evidence. Appellant attached a copy of an undated letter, in which he requested reconsideration of the Office's October 2, 1995 decision. He also attached a medical report adopting the findings of a physical therapist who found that appellant had an 11 percent impairment of the right upper extremity.

In a decision dated October 8, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>1</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>2</sup> Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows “clear evidence of error” on the part of the Office.<sup>3</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>4</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>5</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>6</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>7</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>8</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *But see Leonard E. Redway*, 28 ECAB 242, 246 (1977) (a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>4</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>5</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>6</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>7</sup> *See Travis*, *supra* note 5.

<sup>8</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

and raise a substantial question as to the correctness of the Office decision.<sup>9</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.<sup>10</sup>

The record on appeal fails to demonstrate that appellant made a timely request for reconsideration. Following the Office's October 2, 1995 decision, on appellant's entitlement to schedule compensation, the Office received an undated letter on August 5, 1997 inquiring about a request for reconsideration that appellant stated he sent in September 1996. The record contains no such request and the documents received on August 5, 1997 were not filed within one year of the Office's October 2, 1995 decision. The Office, therefore, properly found that appellant's request for reconsideration was untimely. Further, the evidence submitted to support appellant's request fails to show clear evidence of error in the Office's October 2, 1995 decision. The evidence submitted tends to support that appellant has only an 11 percent impairment of the right upper extremity, while the Office found in its October 2, 1995 decision that appellant had no greater than a 17 percent impairment. On its face, then, this evidence fails to show clear evidence of error in the Office's decision.

The October 8, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
August 6, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>10</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).